



# National Labor Relations Board

## Weekly Summary of NLRB Cases

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*DTR Industries, Inc.* (8-CA-33708-1; 350 NLRB No. 85) Bluffton, OH Sept. 7, 2007. A three-member Board Panel unanimously adopted the administrative law judge's finding that the Respondent violated Section 8(a)(1) of the Act by creating the impression that employees' union activities were under surveillance, threatening to discipline an employee if he continued to engage in union activities, disparately enforcing its uniform policy, and threatening employees with job loss and layoffs if they unionized. The Board also unanimously reversed the judge's finding that the Respondent violated Section 8(a)(3) by discharging Daniel Gahman. In addition, a majority composed of Chairman Battista and Member Schaumber reversed the judge's finding that the Respondent violated Section 8(a)(3) by suspending, discharging, re-suspending, and failing properly to reinstate John Callahan. Member Liebman dissented. [\[HTML\]](#) [\[PDF\]](#)

The Respondent manufactures and supplies parts for automobile companies. The allegations arose in the context of an organizational campaign.

In upholding the threat of job loss violation, the Board distinguished a Sixth Circuit case involving the same Respondent, *DTR Industries, Inc., v. NLRB*, 39 F.3d 106 (6<sup>th</sup> Cir. 1994), in which the court reversed the Board's finding of violation and found that arguably similar remarks were protected by Section 8(c) of the Act. In the earlier case, the Respondent's then-president distributed a letter to employees summarizing what he described as critical factors to consider with respect to an upcoming representation election. Among those considerations was the possibility of losing business. The court determined that the letter provided an objective context and explained reasons why he believed that the Respondent might lose its "sole source" status with certain customers who might "split their business in order to have an alternative supply source in the event of a strike." Because the letter explained that the president's perspective was based upon his industry experience and knowledge of the customer base, his statement was not unlawful. In the instant case there is no objective documentation of the alleged unlawful statements, but rather the evidence consists entirely of witnesses' testimonial accounts. Credited employee testimony established that the Respondent's executive coordinator simply conveyed the message that unionizing would result in the loss of customers, a decrease in business, and ultimately the loss of jobs, without providing a basis for such beliefs or context for his perspective. Because his predictions were not "carefully phrased on the basis of objective fact . . . as to demonstrably probable consequences beyond . . . [the Respondent's] control," as required under *NLRB v. Gissel Packing Co.*, 395 U.S. 575, at 618 (1969), the Board agreed with the judge's finding of violation of Section 8(a)(1).

With respect to both Section 8(a)(3) allegations, the Board assumed that the General Counsel had carried its initial *Wright-Line* burdens and that it was necessary for the Respondent to establish that it would have taken those disciplinary actions irrespective of unlawful considerations. Regarding Gahman, who was discharged following the receipt of drug test results, the Board rejected the judge's disparate treatment analysis as "fundamentally flawed," and based on a "strained interpretation" of the lab report as well as an erroneous comparison of non-equivalent situations. The Board concluded that he was legitimately discharged for violating company policy by attempting to circumvent the purpose of the test and acting dishonestly. As for Callahan, the majority found that the Respondent acted upon a reasonable belief that during a two-day period, he deliberately produced hundreds of defective, useless parts,

costing the Respondent several thousand dollars in losses. Absent an alternative objective explanation for this experienced and skilled employee's sudden soaring error rate, the majority concluded that the Respondent would have disciplined Callahan as it did irrespective of his union activity.

In dissent, Member Liebman observed that absent any evidence that Callahan was motivated to sabotage his own work, his spurt of production errors may have been the result of difficulty in adjusting to the configuration of the line to which he was assigned, one that was set up in a mirror-image of his usual work station. In any event, the evidence shows that the Respondent initially discharged Callahan without a thorough investigation and that the severity of the discipline imposed following the "peer review" panel's vote to overturn his discharge (three and one half month unpaid suspension followed by reassignment to a less desirable job and shift) appear to be at odds with the Respondent's more typical disciplinary practices involving employees who were not involved in union activity

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by the Auto Workers; complaint alleged violations of Section 8(a)(1) and (3). Hearing at Lima, Ohio, Dec. 16-18, 2003. Adm. Law Judge John H. West issued his decision April 9, 2004.

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*Teamsters Local 579 (Chambers & Owen, Inc.)* (30-CB-4550-1; 350 NLRB No. 87) Janesville, WI Sept. 7, 2007. The Board majority of Chairman Battista and Members Schaumber and Kirsanow found that the Respondent-Union breached its duty of fair representation and violated Section 8(b)(1)(A) of the Act by failing to provide certain data relating to expenditures to "Beck objectors." In *Communications Workers v. Beck*, 487 U.S. 735 (1988), the Supreme Court found that Section 8(a)(3) does not permit a union to spend funds collected from objecting non-members under a union security provision on activities unrelated to collective bargaining, contract administration, or grievance adjustment. These employees are entitled to a reduction in their dues based on the percentage of union expenditure spent on "non-chargeable" activities.

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The Board majority denied the Union's motion for summary judgment requesting dismissal of the allegation and granted Charging Party Jones' cross-motion for summary judgment requesting a finding of the violation. The Board found that under the Supreme Court's decision in *Chicago Teachers' Union Local 1 v. Hudson*, 475 U.S. 292 (1986), "basic considerations of fairness" require that *Beck* objectors be given sufficient information so as to determine whether they should challenge the union's apportionment of expenditures into chargeable and non-chargeable categories. The Board also noted that in *Penrod v. NLRB*, 203 F.3d 41 (D.C. Cir. 2000) (denying enforcement of *Teamsters Local 166 (Dyncorp Support Services)*, 327 NLRB 950 (1990)(*Dyncorp I*), decision upon remand, 333 NLRB 1145 (2001)(*Dyncorp II*)), the D.C. Circuit rejected the Board's finding in *Dyncorp I*, supra, that the duty of fair representation does not require a union to identify "per capita" payments to affiliate

organizations prior to a challenge of the unions' reduced dues and fees calculation. Accordingly, the Board here ordered the Union to cease and desist and provide Jones with the following information regarding its affiliate expenditures for 1999: the major categories of expenditures of each of the affiliates with which it shared income from dues and fees, the percentages of each such category of each affiliate that it allocated to chargeable and nonchargeable expenses, and a detailed explanation of how the affiliates' expense allocations were calculated.

In dissent, Members Liebman and Walsh stated that, pursuant to the three-step procedure announced in *California Saw & Knife Works*, 320 NLRB 224, 230 (1990), they would find that the union had no legal duty of fair representation to provide the information at issue prior to the filing of a challenge to the union's reduced fee calculation. Specifically, the dissent asserts that: [t]he procedure announced in *California Saw* and applied in *Dyncorp I* appropriately balances unions' interest in administrative economy and efficiency and *Beck* objectors' need for information concerning the expenditures of affiliates with which unions share income from dues and fees.

The dissent criticized the majority on two grounds: first, its reliance on the Supreme Court's opinion in *Hudson*, supra, is inapposite because *Hudson* concerned a public sector union and was decided the case on constitutional grounds – and not under the duty of fair representation. Second, the majority ignored the possibility that the Supreme Court would have deferred to the Board' prior view in *Dyncorp I* because of its administrative expertise in interpreting the Act. *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984).

(Full Board participated.)

Charge filed by Brandon M. Jones, an individual; complaint alleged violation of Section 8(b)(1)(A). Respondent filed motion for summary judgment Nov. 24, 2003 and Charging Party filed cross motion for summary judgment Dec. 22, 2003.

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### LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

*A & L Industrial Services, Inc.* (Individuals) Deer Park, TX Sept. 4, 2007. 16-CA-25391, et al.; JD(ATL)-24-07, Judge Michael A. Marcionese.

*Teamsters within Western Pennsylvania and Joint Council #40, Local 926* (Penske Truck Leasing Co., L.P.) Neville Island, PA Aug. 31, 2007. 6-CB-11383; JD-58-07, Judge David I. Goldman.

*Custom Floors, Inc., et al.* (Painters District Council 15) Las Vegas, NV Sept. 5, 2007. 28-CA-21226, et al.; JD(SF)-26-07, Judge Lana H. Parke.

*Painters District Council 711* (Costanza Builders of New Jersey, Inc.) Cherry Hill, NJ  
Sept. 4, 2007. 4-CC-2484; JD-60-07, Judge John T. Clark.

*T.E. Briggs Construction Co., Inc.* (Operating Engineers Local 302) Seattle, WA Sept. 5, 2007.  
19-CA-30668; JD(SF)-25-07, Judge Mary Miller Cracraft.

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**LIST OF UNPUBLISHED BOARD DECISIONS AND ORDERS  
IN REPRESENTATION CASES**

*(In the following cases, the Board considered exceptions to  
Reports of Regional Directors or Hearing Officers)*

**DECISION AND CERTIFICATION OF RESULTS OF ELECTION**

*Haggen, Inc.*, Beaverton, OR, 36-RC-6373, Sept. 6, 2007 (Chairman Battista and  
Members Schaumber and Walsh)

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*(In the following cases, the Board adopted Reports of  
Regional Directors or Hearing Officers in the absence of exceptions)*

**DECISION AND ORDER [remanding case to Regional Director  
for further appropriate action]**

*VNA Utility Contracting Co., Inc.*, New York, NY, 29-RC-11177, Sept. 6, 2007  
(Chairman Battista and Members Liebman and Walsh)

*Carullo Construction Corp.*, Brooklyn, Bronx, Manhattan, Queens and Staten Island,  
NY, 29-RC-11072, Sept. 7, 2007 (Chairman Battista and Members Liebman and Walsh)

**DECISION AND CERTIFICATION OF REPRESENTATIVE**

*MS Grand Bedford Park Inc. d/b/a Grand Mart*, Bedford Park, IL, 13-RC-21609,  
Sept. 7, 2007 (Chairman Battista and Members Liebman and Walsh)

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***(In the following cases, the Board denied requests for review  
of Decisions and Directions of Elections (D&DE) and  
Decisions and Orders (D&O) of Regional Directors)***

*Airgas Dry Ice*, Santa Fe Springs, CA, 21-UC-422, Sept. 5, 2007

(Chairman Battista and Members Liebman and Walsh)

*Midwest Air Traffic Control Service, Inc.*, Jackson, MI, 7-RD-3576, et al.,

Sept. 5, 2007 (Chairman Battista and Members Liebman and Walsh)

*Bremner Food Group, Inc.*, Princeton, KY, 26-RC-8526, Sept. 5, 2007

(Chairman Battista and Member Liebman; Member Walsh dissenting)

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